

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

** PLEASE RETURN TO **
** RECORDS ROOM **

77-1335

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- :

VINCENT JAMES SANTA, JOSEPH DELUCA, :
PATRICK DEFILIPPO, JAMES DEFILIPPO, :
and MANUEL GOMEZ, :

Defendants-Appellants. :
:
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Docket No. 77-1335

Docket No. 77-1370

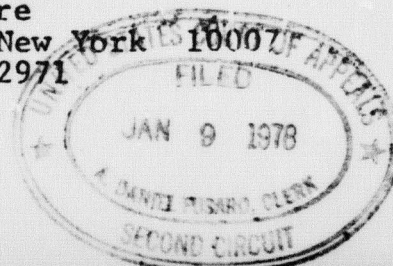
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BRIEF FOR APPELLANT
JOSEPH DELUCA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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Defendants-Appellants. :
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Docket No. 77-1335
Docket No. 77-1370

BRIEF FOR APPELLANT
JOSEPH DELUCA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether it was error to deny the defense motion to suppress without a hearing on the ground that these defendants lacked standing to challenge the search and seizure at the CBS warehouse, when the defendants possessed automatic standing on the possession count and actual standing on the conspiracy count.

2. Whether it was error to admit in evidence the hearsay statements of Stanley Diamond and to direct that they could be regarded as binding on all the defendants as the statements of a co-conspirator, when Diamond was neither indicted nor connected to the alleged conspiracy by any evidence adduced by the Government.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered July 15, 1977, after a jury trial, convicting appellant Joseph DeLuca of possession of goods stolen while moving in interstate commerce (18 U.S.C. §659) and conspiracy to possess goods stolen while moving in interstate commerce (18 U.S.C. §371). Appellant was sentenced to an indeterminate prison term of two years on the conspiracy count, and sentence was suspended and a five-year probation term imposed on the substantive count. The two-year prison sentence was made to run consecutively to a four-year federal prison term imposed previously, which appellant DeLuca is currently serving, and the five-year probation term was made to commence at the conclusion of the two-year prison term imposed. Appellant Joseph DeLuca is

currently serving the previously imposed four-year prison term and has not begun service of the instant sentence.

By order of this Court dated September 2, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant Joseph DeLuca was indicted in the Eastern District of New York for possession between March 11 and 13, 1975, of goods stolen while moving in interstate commerce, and for conspiracy between March 10 and 19, 1975, to possess goods stolen while moving in interstate commerce. The indicted conspirators, all of whom were also charged in the substantive count, were Vincent James Santa, John Savino, James DeFilippo, Patrick DeFilippo, Manuel Gomez, and Joseph DeLuca. These defendants were jointly tried before The Honorable Jacob Mishler.

Prior to trial, the defendants joined in a motion to suppress physical evidence seized by federal agents. The defendants were accused of having possessed a quantity of Schick shaving products which had been hijacked from a truck moving in interstate commerce; these products were allegedly sold by the defendants to other persons who took delivery of the goods at a warehouse in Brooklyn. The federal agents obtained a search warrant to search the warehouse after this delivery, and the defendants, by their motion, sought to suppress any evidence relating to

this seizure.

The Government opposed the motion on standing grounds, because the defendants, following their delivery of the goods, had no possessory interest in them or in the premises which were searched (T.24-25*). The court noted that it had already presided at a suppression hearing on this question in the prosecution of the purchasers of stolen goods, and though it denied the motion in that case, it now observed: "Of course, after listening to the entire trial I would say the affidavit was pretty skimpy and you could have put a lot more in there that would have put the affidavit adequate and sufficient beyond a peradventure of a doubt" (T.27a).** Nevertheless, this point was deemed irrelevant since the court was concerned solely with these defendants' standing (T.28). Despite counsel's assertion of automatic standing (T.30) and of actual standing based on their possessory interest in the goods for which full payment had not been received (T.33, 35-37), and despite the Government's indication that it intended to offer in evidence some of the seized goods and testimony concerning the seizure (T.34), the court denied the motion and refused to hold a hearing on the

*References to pages of the trial transcript are preceded by "T".

**Counsel noted that one defense claim was that there was a misrepresentation in the affidavit as to what the informant had seen (T.38); the written motion to suppress addressed broader inadequacies in the affidavit (Record on Appeal, Document #39). The affidavit in support of the application for a search warrant is reproduced as "D" to the separate appendix to the brief for appellant DeLuca.

ground that the defendants lacked standing to advance their claim (T.38).

The case proceeded to trial. Paul Pollari, a paid Government informant, had known all the defendants but DeLuca for several years from Robert's Lounge on Leffert's Boulevard, and met DeLuca in March 1975, just before the crime in question (T.131-135). Pollari indicated that he had occasion to see the defendants at Robert's Lounge, at a dress shop on Lefferts Boulevard, and at the home of Tommy "Wheels" (actually DiCandia) (T.137). James DeFilippo, with whom he had previously lived, called him on March 11, 1975, and told him there would be work on March 12; he understood that the work entailed unloading a truck (T.142). Pollari was picked up on the morning of March 12 by James and Patrick DeFilippo and Manuel Gomez, and they drove to Tony's Gulf Station, where they rented a van and two straight trucks.* From there, they drove to the Simco lot to unpack the truck (T.144-146).

At the Simco lot, they were greeted by Vincent Santa and Joseph DeLuca (T.149). The truck they were to unload was a tractor trailer operated by Time DC, Inc., and it contained a shipment of Schick products. This was the truck hijacked the night before from Time DC driver Carrol Lee Bridgeforth by unknown persons (T.111-113a). Pollari recalled that all persons

*Arnold E. Brandt, a security officer for the Hertz Corporation, testified that the dispatch records, completed on the basis of information received from Tony's Gulf Station, indicated that these vehicles had been idle during the week they were allegedly rented by the DeFilippos (T.825-827).

present assisted in unloading boxes from the Time DC truck onto the first of the rented straight trucks, and thereafter onto the second straight truck (T.155). It was Santa and Pollari who ripped the Time DC signs from the hijacked truck (T.165).

Pollari drove with Gomez in the first straight truck to the S & F warehouse; from 10:30 or 11:00 a.m. (direct) or 1:30 (cross) to 5:30 p.m.,* they unloaded the truck (T.167-169, 255-256). Though Pollari stated that they then returned to the Simco lot, where he saw Santa and DeLuca (T.172-173), he had previously testified that he went directly home from the S & F warehouse, and he admitted that his "best recollection" was that he went back to the Simco lot not that night but the following morning (T.284, 287, 304). On that morning of March 13, after meeting with FBI agents, Pollari met the DeFilippos, Gomez, and Santa (he did not mention DeLuca's presence) at the Blue Bay Diner in Queens, where he and Gomez were assigned to take the second straight truck to the CBS warehouse (T.175-176, 181-182). They did so, and 15 minutes after they arrived at CBS, the DeFilippos drove up in two vans -- one that Pollari and the others had rented from Tony's Gulf Station the day before, and a second, a U-Haul, that Pollari claimed Santa told him had been obtained by DeLuca (T.176) -- a fact Pollari had not mentioned before the grand jury (T.308-319). The three vehicles were unloaded, and

*James Watkins, a security agent for S & F, testified that the records established that the truck in question entered the S & F warehouse lot at 1:55 p.m. (T.811-812).

the goods were accepted by several Hassidic Jews (T.182, 185). Gomez left first, and Pollari left later with James DeFilippo, who drove the U-Haul van to the rental location (T.186-189). Pollari and the two DeFilippos then went to Wheels' (DiCandia's) house (T.190). Pollari and the DeFilippos were advised by Santa, who was already there, that "the FBI had hit the CBS warehouse;" Santa then gave the three men \$700 each (T.190-191). At the time this conversation occurred, Pollari, the DeFilippos, and Santa were standing in the hallway near the front door, and Joseph DeLuca was "sitting in the back" and could be seen only in profile (T.190-191, 323).

Pollari testified to a conversation he overheard in the apartment of one Tommy DiSimone between DiSimone and Santa several days later in which Santa said, "We already got \$20,000 from them and we ought to get another \$20,000 because it was probably their fault" (T.216).^{*} This aspect of Pollari's account was severely undercut by his subsequent testimony, in which he wavered on whether he heard DiSimone's voice and the amount of time he spent in the kitchen (T.225-233), by the fact that he had neglected to mention that DiSimone's kitchen, where he was standing when he allegedly overheard this conversation, was charred from a fire (T.305-306), and by the stipulated fact that DiSimone was incarcerated when this alleged conversation was to have taken place (T.219, 223, 1028).

^{*}This conversation was admitted as evidence against Santa alone (T.197, 214).

Pollari, who had been an informant for four or five months by this time, realized a substantial sum from this case: \$2,000 initial payment from the FBI, \$5,000 additional payment from the FBI, and two awards of \$4,000 each from two insurance companies (T.216-217, 312-316), and he kept such monies as the \$700 he received from Santa (T.387). Numerous contradictions and inconsistencies in his testimony were explored on cross-examination.*

A second informant, Thomas Cogar, also testified for the Government. Cogar's father-in-law owned the dress shop where the defendants met, and Cogar saw the defendants there often; though he was in the dress shop every day during 1974-1975, he never had occasion to see Pollari inside the shop (T.663-667, 792-793).** Cogar also frequented Robert's Lounge and DiCandia's house (T.667-671). It was at DiCandia's house on March 12, 1975, that Cogar and Gomez had a conversation. Gomez had asked Cogar to drive him to a parked car which was rented and due back; during the drive to the car, Gomez said to Cogar "that he had to

*Pollari's credibility is not of central concern on this appeal, but it bears noting that his testimony was often confused and inconsistent with prior testimony given, and his memory was demonstrably weak. E.g., testimony concerning where he lived and for what length of time as it related to his association with the defendants and the FBI (T.245-251, 371-374); testimony concerning who was present when he was picked up on March 12 (T.144-146, 252-254); testimony concerning when he arrived at S & F on March 12 (T.168-169, 172, 255-256); testimony concerning DeLuca's participation in obtaining the U-Haul van (T.176, 308-309).

**Cogar did not mention that he was barred from the dress shop, and did not enter the shop, after February 1975, as Katherine Vita, his mother-in-law, testified (T.942-944).

have the car back that day, and that they had just made a \$500,000 score" (T.676-677). They arrived at the car, but Gomez was unable to enter the locked vehicle (T.679). Cogar returned with Gomez a few days later, at which time "he was a little upset due to the fact that the car was overdue and he still hadn't gotten his money and that he had rented the car on his own name and it was used on a razor, or a razor blade job" (T.679).*

Gomez' admissions to Cogar were admitted without objection, but there was avid exception to the Government's offer of the statements of one Stanley Diamond to Vincent Santa which were overheard by Cogar (T.681-691). These statements were offered against all the defendants under the co-conspirator rule, which the Government sought to apply to Diamond (T.680-681).** The court charged the jury on the use of a co-conspirator's statement against all the conspirators, instructing the jurors that it was essential that the statements had

*Cogar identified the car depicted in Government Exhibits #1 and #1-A as Cogar's rented car (T.678). Carrol Lee Bridgeforth, the trucker whose Time DC truck was hijacked, stated that the green or tan Plymouth or Dodge used in the hijacking resembled the car in Exhibits #1 and #1-A (T.112, 114-115). Irving Rosen leased the car to Gomez on March 10; it was due back on March 12, but Gomez returned it on March 21 (T.796-797).

**Diamond was not indicted for the conspiracy in issue, and the Government, neither before nor after the admission of this evidence, presented proof connecting him to this conspiracy. He had been indicted in another conspiracy prosecuted in New Jersey which also involved several of these defendants (T.68-69; see Document #27 to the Supplemental Record on Appeal (New Jersey indictment)).

been made "during the term of the conspiracy and ... to further the objectives or the purposes of the conspiracy" (T.693-694), and then allowed Cogar to testify to the conversation between Diamond and Santa. In relevant part, Cogar's testimony was as follows:

Q. Were you present during any conversations that Mr. Santa had on or about March 14, 1975?

A. Yes, sir.

. . .

Q. And what was Mr. Santa doing?

A. He was reading a newspaper and he asked Stanley Diamond what he thought of the rabbis [the Hassidic Jews who purchased the stolen Schick products] as he handed him the paper, and Stanley said not to worry, they are tough people, they will stand up.

. . .

Q. Did you have occasion to see what they were looking at in the newspaper?

A. Yes.

Q. What was that?

A. It was an article dealing with three people apprehended with a load of razor products stolen.

Q. Were you privy to any conversation later that day?

A. Yes, sir.

. . .

Q. Who was present that afternoon?

A. Myself, Stanley Diamond, Manny Gomez,

Mr. Santa.

Q. And what if anything was said at that time?

A. Mr. Santa excused himself to use the phone and Stanley Diamond said, "People think that the Italians have all the money, but it is really the Jews that have all the money."

Q. Did he say anything further? Were you privy to any further conversation that Mr. Santa had about a week later?

A. Yes, sir.

. . .

Q. Who was present?

A. Myself, Mr. Santa, Stanley Diamond, Tommy Wheelers [DiCandia], Billy Santa. I think that is it.

Q. And what occurred at that time?

A. Stanley Diamond asked Mr. Santa if he was going to get any more money from the rabbis, and he said that he would meet with them on the following Saturday. Stanley said that he needed money to bring his lawyer in Virginia.

Q. . . . Was there any further conversation about money at that time?

A. Yes, Mr. Santa excused himself to make a phone call and Stanley said to Mr. Gomez that the money they received was all brand new one hundred dollar bills with the wrappers bearing the Star of David.

(T.696-699).*

*In conjunction with the receipt of this evidence, the court gave the jurors the following instruction, quoted in relevant part:

Now, where the Government establishes that the conspiracy charged in the indictment existed, that the person that performs the act in question or

Cogar's testimony was attacked on the basis of his exten-

(Footnote continued from the preceding page)

makes the statement is a member of that conspiracy, then it is chargeable against anyone whom the Government proves beyond a reasonable doubt knowingly and wilfully enters that conspiracy, if the conversation or act is performed during the term of the conspiracy and in order to promote the objectives of the conspiracy.

. . . .

Now you will decide whether it was -- first you will decide whether you believe Mr. Cogar. If you believe that the conversation occurred, then you decide whether it is during the term of the conspiracy and whether it is to further the objectives or the purposes of the conspiracy.

(T.693-694).

The court's charge to the jury on this point was as follows:

As I told you, the idea of a conspiracy is that each conspirator, or partner, as we will call them, is an agent of every other member of the conspiracy, and one member may speak for all the other members if he speaks during the term of the conspiracy and if the purpose is to advance the purpose of the conspiracy, in this case again the receipt and possession of the goods.

But before we may charge any accused with what somebody else said or did out of his presence, the Government must prove beyond a reasonable doubt that the conspiracy charged in the indictment existed at the time and for the purposes state[d].

(2) That the person who acts or speaks is shown to be a member of the conspiracy by proof beyond a reasonable doubt. Then that the act or conversation is chargeable against any accused that you find beyond a reasonable doubt knowingly and wilfully entered into the conspiracy.

(T.1313-1314).

sive criminal record -- everything from burglary and felonious assault to falsifying a police report -- and his four or five year, \$120 per day heroin habit (T.660-662, 706-711, 714-718, 721-722). He was paid about \$2,400 by the Government for his work in this case (T.673). He became an informant for the Eastern District Strike Force in exchange for government assistance in a pending case involving credit cards stolen from the mails (T.672). Apparently, his testimony in the case at bar was exchanged for government assistance with regard to cases involving burglary, sale of guns, and distribution of stolen tires (T.674-675).

FBI agents Donald Dowd (T.449) and Robert Pecoraro (T.542) received information from Pollari (T.181, 451, 542). The agents met Pollari at approximately 7:30 a.m., March 13, 1975, in a parking lot and were advised about the delivery to CBS later that morning (T.450, 545); the Government did not attempt to explain how Pollari was able to supply this information to the agents before he met Santa and the others at the Blue Bay Diner and purportedly was told of the delivery to CBS (T.175, 181-182). The agents established surveillance positions in an armory overlooking the CBS warehouse yard and maintained their observations from about 10:00 a.m. to 4:00 p.m. (T.452-455, 547).

At 11:45 a.m., the agents observed a Hertz straight truck drive near a loading platform and park. Manuel Gomez exited and met the Hassidic Jews, and after a brief conversation, space was

cleared at the loading platform and the truck backed in (T.455-457). Gomez and Pollari began to unload the truck and were doing so when, at about noon, two vans entered the yard, one driven by Patrick DeFilippo and the other by James DeFilippo, and assumed unloading positions at the dock (T.458-459). The Hassidic Jews made another appearance, and the DeFilippos joined Pollari and Gomez and unloaded the trucks (T.459-560). During the unloading, the agents were able to see that the cardboard boxes were marked with the brand name Schick (T.458, 548). When the straight truck was unloaded, Gomez drove away; the other three remained until about 4:00, when unloading of the two vans was completed (T.461). The license plates of the vehicles were recorded, and the agents' notes showed that the U-Haul van bore an out-of-state license, BJS027 (T.464, 550).

Dowd testified that he participated in a search of the CBS warehouse at approximately 4:20 to 4:25 p.m. on March 13 (T.465). The agent was accompanied by eight or nine fellow agents, and they located 5,072 cartons of Schick products on the fourth floor of the warehouse (T.466).^{*} In addition, a number of documents were seized. These documents were not permitted in evidence (T.468-469), but the Government did introduce, over objection, seven cardboard containers of Schick products which were among those seized from the CBS warehouse (T. 462, 467). At a subsequent time at trial, Frank Walsh, operations

^{*}Dowd had not known that these items had been placed on the fourth floor before finding them there (T.501-502).

manager of Time DC, testified that on the evening of March 13, 1975, he examined and took a count of the Schick products which had been recovered in the warehouse; an FBI document reflecting Walsh's count was admitted in evidence (T.806-808).*

Gerald Green, a U-Haul dealer, leased an Econoline van on March 12, 1975, which was returned on March 13 (T.536, 540). This vehicle carried Oregon license plate number PJ5027 (T.541). The customer's name reflected on the rental agreement was Joseph DeLuca, and a driver's license in that name was also shown; the signature "Joseph DeLuca" appeared on the bottom of the agreement (T.535-536, 853-854). Lester Hay, an FBI special agent, obtained handwriting exemplars from DeLuca on February 4, 1977 (T.830, 848). Hay also determined from the Department of Motor Vehicles that the driver's license number appearing on the rental agreement was assigned to Joseph DeLuca (T.849).**

Thomas Delaney, a former FBI laboratory agent, testified as a handwriting expert that it was Gomez' signature on the rental agreement for the Plymouth mentioned in Cogar's testimony (T.852-853). However, after the court learned that another

*It was also stipulated that officials of the Warner Lumber Company would identify the Schick products recovered by the FBI as those which had been shipped in a Time DC trailer to Anaheim, California, and that these goods had a wholesale value of \$240,178 and a retail value of \$405,141 (T.911-912).

**It was later stipulated that the license number, address, and telephone number appearing on the U-Haul rental agreement were DeLuca's (T.912).

Government expert had reached no conclusion as to DeLuca's signature on the U-Haul truck rental agreement, and after it advised the Government that it would not submit to the jury the question of the signature on this document without expert testimony that the signature was DeLuca's (T.830-831, 834), Delaney was recruited to testify on the DeLuca signature. He compared the rental agreement signature to the same exemplar as had the Government's original handwriting expert, and though he, too, classified this analysis in the no conclusion category, he was willing to say "with a reasonable degree of certainty [that] the writer of Exhibit 27 wrote the signature on Government Exhibit 16" (T.854-855). The original expert had not suggested in his report that any such conclusions could be made (T.860), and the procedures normally employed by FBI analysts were contrasted with those employed by Delaney: he made the comparison to the exemplar a couple of hours before testifying, in the United States Attorney's office, for a total of five or ten minutes, without any specialized laboratory equipment used in this type of analysis (e.g., microscopes, photographic materials, etc.) (T.853-854, 857-858, 861, 864).

The Government presented Robert Snyder, an agent with the United States Customs Service, on the question of a prior similar act. On November 26, 1974, a containerload of Yves St. Laurent suits was hijacked; Snyder was engaged in surveillance of a warehouse in Matawan, New Jersey, on December 2 (T.

883-884). He saw DeLuca appear at the loading dock in a van, enter the building, and leave after about ten minutes (T.885-886); half to three-quarters of an hour later, Santa, Cogar, and one Scorino arrived and began loading "YSL, New York" boxes onto their trucks (T.887-888). These persons were thereupon arrested (T.888). It was stipulated that DeLuca, Santa, and both DeFilippos had been convicted of possession of stolen goods and conspiracy to possess stolen goods in connection with the incident described by Snyder (T.905-907).*

The defendants presented several witnesses, though DeLuca was the only one who mounted a true defense. DeLuca's witnesses were offered to show that, on March 12 and 13, he was not involved in loading stolen merchandise, but in buying and selling used cars in connection with his own business, J & J Auto Sales.

Jeffrey Levine, J & J's accountant, testified that the company's purchase/sales log ("police book") showed that on March 12, a 1969 yellow Mercury was purchased by J & J and that it was sold first to a Mr. Guararo and then to a Mr. Lespinasse (T.952, 955-957). Clifford Murphy, who often visited the lot, recalled the incident involving the yellow Mercury, because DeLuca first agreed to sell the car to Murphy for Guararo but then rescinded the offer in the late afternoon because the car had previously

*At the conclusion of the Government's case, the defendants moved to dismiss all charges; DeLuca's motion was denied (T.914), as were the motions of the other defendants with the exception of Savino, whose motion was granted (T.917-927).

been sold. Murphy remembered that on the day this occurred (without having a distinct recollection of the date) he first saw DeLuca at J & J at 8:30 a.m.; DeLuca then left between 9:00 and 9:45 a.m. and returned two hours later with the yellow Mercury (T.965-968, 972). Dennis Dexter, a salesman for Jameco Chevrolet, testified that a Mr. Maguire of Jameco had mistakenly sold the car to DeLuca on the morning of March 12 though he (Dexter) had accepted a deposit on the car two days earlier from a Mr. Lespinasse (T.978-983). DeLuca returned to Jameco with the car and sold it directly to Lespinasse (T.983, 992).

Frederick Greaves offered testimony relevant to DeLuca's whereabouts on the following day, March 13. Greaves was a used car salesman and he attended the Roosevelt Raceway Auto auctions held on Thursdays (T.1000). Though he had no specific recollection of this particular Thursday, he testified that his practice was to put a car up on auction first, and to sell the car privately on the auction grounds if the bidding was too low; if he sold the car at auction, the buyer's check was made payable to Roosevelt, and if he sold the car privately, the buyer's check was made to him personally. Further, the private sales would usually occur between 3:30 and 5:00 p.m. (T.1000-1010). DeLuca's March 13 check to Greaves personally, indicating a private sale to DeLuca, was admitted in evidence (T.1013).

At the conclusion of the evidence, the court denied defense

motions for a directed verdict of acquittal (T.1084-1085). Following summations and the court's charge to the jury, the case was sent to the jury. Deliberations were interrupted with a request for the reading of testimony of four conversations; one of the requested conversations was that between Santa and Diamond in which Diamond made statements which had been admitted under the co-conspirator rule (T.1332, 1336-1337; see T.688-691, 695-699). After further deliberations, the jury announced its verdict of guilty on both the substantive and conspiracy counts against all five defendants (T.1339-1340).

DeLuca and his co-defendants were sentenced on July 15, 1977. With the exception of Santa, who was depicted as the organizer and was sentenced to indeterminate prison terms of five and ten years (concurrent), the defendants were sentenced to indeterminate prison terms of two years (conspiracy) and probation terms of five years (substantive).

ARGUMENT

Point I

IT WAS ERROR TO DENY THE DEFENSE MOTION TO SUPPRESS WITHOUT A HEARING ON THE GROUND THAT THESE DEFENDANTS LACKED STANDING TO CHALLENGE THE SEARCH AND SEIZURE AT THE CBS WAREHOUSE, WHEN THE DEFENDANTS POSSESSED AUTOMATIC STANDING ON THE POSSESSION COUNT AND ACTUAL STANDING ON THE CONSPIRACY COUNT.

The district court's refusal to entertain the defense motion to suppress on the ground that the defendants lacked standing to challenge the search and seizure at the CBS warehouse disregarded their automatic standing under the first count of the indictment charging possession of stolen goods and their actual standing under the second count of the indictment charging conspiracy to possess stolen goods. Unless Jones v. United States, 362 U.S. 257 (1960), is to be overruled, and the express allegation by the defendants of a possessory interest in the goods is to be ignored, adequate grounds on both counts were asserted to confer these defendants with standing to seek suppression of the seized goods.

Jones v. United States, supra, remains the law in this Circuit as to automatic standing with regard to possessory crimes. United States v. Galante, 547 F.2d 733, 737 (2d Cir. 1976), cert. denied, ___ U.S. ___ (June 13, 1977); United States v. De Marco, 488 F.2d 828, 829 n.1 (2d Cir. 1973); United States v.

Mapp, 476 F.2d 67, 72-73 (2d Cir. 1973); United States v. Pastore, 456 F.2d 99 (2d Cir. 1972); United States v. Price, 447 F.2d 23, 29 (2d Cir.), cert. denied, 404 U.S. 912 (1971). Simmons v. United States, 390 U.S. 377, 391-394 (1968), and Brown v. United States, 411 U.S. 223, 229 (1973), involved non-possessionary crimes; and while they may intimate that the rule of automatic standing will someday change, this Court has distinguished itself from the Sixth Circuit (United States v. Delguyd, 542 F.2d 346 (6th Cir. 1976)) and has upheld a defendant's automatic standing "to challenge the admission of seized goods with respect to the possession count of the indictment." United States v. Galante, supra, 547 F.2d at 737.

Though United States v. Galante, supra, 547 F.2d at 738, holds that a defendant does not have automatic standing to challenge a seizure under a conspiracy count, it recognizes that a defendant may establish actual standing by showing "the interest in the searched premises or the seized property necessary for standing." Id., 547 F.2d at 736. A defendant may most readily seek to establish his interest in the searched premises, thereby remaining somewhat removed from the seized goods;* but a defendant may also elect the more direct route

*He may establish the requisite interest in the premises by showing either that he was on the premises at the time of the search or that he had a proprietary or possessory interest in the premises. See Brown v. United States, supra, 411 U.S. at 229.

to standing -- he may allege his interest in the seized property, as the defendants did here. See Simmons v. United States, supra, 390 U.S. 377. In seeking a hearing and arguing standing, defense counsel noted that a substantial payment for the property had not yet been received by the defendants; until that payment was made, the defendants remained constructively in possession of at least a portion of the goods. It is notable that the seizure occurred moments after the defendants delivered the goods to the Hassidic Jews on March 13, 1975, and that the indictment alleged that the conspiracy to possess continued until March 19, 1975. These circumstances confirm that the defendants claimed an adequate interest in the seized property to establish their actual standing under the conspiracy count (cf. Brown v. United States, supra, 411 U.S. at 229).

The defendants, therefore, were entitled to a hearing on their motion to suppress and to a ruling on the merits of the motion. The court's belief that the defendants lacked standing should not have been viewed as an automatic bar to a hearing, since the factual allegations documenting the defendants' standing were themselves a proper subject for the suppression hearing (see, e.g., United States v. Galante, supra, 547 F.2d at 739 and n.10).^{*} Therefore, the case should be remanded for

^{*}Equally, the court's remark that it had presided at the suppression hearing of the Hassidic Jews and had upheld the legality of the search was surely not intended to suggest that

a hearing at which the legality of the search is determined.

It bears noting that the few facts of record on this point suggest that the evidence was seized illegally. The search of the CBS warehouse and the seizure of the Schick products were accomplished by federal officers acting on authority of a warrant. The affidavit section recites that on March 11, 1975, a load of Schick products consisting of nearly 7,500 cartons was hijacked between Connecticut and California, and that a reliable confidential informant was present at the CBS warehouse on March 12, 1975, where he saw several thousand cartons of Schick razors. No allegation linking the stolen goods to the Schick products in the warehouse was made; executing agent Patrick Colgan alleged neither independent observation nor informant's information that disclosed any feature identifying the goods stored in the CBS warehouse as those stolen somewhere between Connecticut and California. The affidavit upon which this search warrant was authorized thus failed to state facts sufficient to establish probable cause. See United States v. Karathanos, 531 F.2d 26, 31 (2d Cir. 1976); United States v. Roth, 391 F.2d 507, 511 (7th Cir. 1967); cf. United States v. Viggiano, 433 F.2d 716,

(Footnote continued from the preceding page)

the former proceeding had any bearing on the determination of this action, in which the parties were entirely different (see, e.g., Ashe v. Swenson, 397 U.S. 436, 443 (1970)).

718-719 (2d Cir. 1970), cert. denied, 401 U.S. 938 (1971).*

There would likely be additional testimony relevant to the determination of the motion to suppress, and the affidavit to the warrant alone may be viewed as an inadequate record on this question. Nevertheless, the affidavit raises serious questions as to the legality of the search and confirms that the defendants are entitled to a hearing and decision on their motion. Moreover, since the Government offered in evidence several of the seized items as exemplars and elicited testimony of Agent Dowd and Time DC operations manager Frank Walsh regarding the seizure, an order of suppression would mandate a new trial.

*The district judge himself admitted, "Of course, after listening to the entire trial I would say the affidavit was pretty skimpy and you could have put a lot more in there that would have put the affidavit adequate and sufficient beyond a peradventure of a doubt."

Point II

IT WAS ERROR TO ADMIT IN EVIDENCE THE HEARSAY STATEMENTS OF STANLEY DIAMOND AND TO DIRECT THAT THEY COULD BE REGARDED AS THE STATEMENT OF A CO-CONSPIRATOR, WHEN DIAMOND WAS NEITHER INDICTED NOR CONNECTED TO THE ALLEGED CONSPIRACY BY ANY EVIDENCE ADDUCED BY THE GOVERNMENT.

The foremost requirement of the hearsay exception for co-conspirator statements (F.R.Ev. 801(d)(2)(E)[01]) is that the statement in question be made by one who genuinely is a co-conspirator. This rule was invoked below to admit the statements of Stanley Diamond, whom the Government described as a co-conspirator. Yet Diamond was not one of the individuals indicted for this crime, and the Government did not produce a whit of evidence tying him to the alleged conspiracy. Moreover, the court made no preliminary ruling (F.R.Ev. 104(a)) that there was sufficient evidence that Diamond was a member of any such conspiracy to justify admitting hearsay testimony of his statements under the co-conspirator exception. Consequently, the jury was treated to inadmissible hearsay testimony providing evidence that this conspiracy existed, that the Government's account of the conspirators' objectives was true, that the conspirators had actually received substantial payment, and, though DeLuca was not one of those specifically named, that this group of charged conspirators was guilty.

In United States v. Cafaro, 455 F.2d 323, 326 (2d Cir.),

cert. denied sub nom. Schulman v. United States, 406 U.S. 918 (1972), and United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), this Court formulated its rule that, before hearsay statements may be admitted under the co-conspirator exception, the trial judge must find that the declarant's participation in the conspiracy had been shown "by a fair preponderance of the evidence independent of hearsay utterances." Accord, United States v. Petrozzello, 548 F.2d 20, 23 (1st Cir. 1977) (Coffin, C.J.). Diamond, who was associated with these defendants only through a separate incident involving possession of stolen goods, had not been mentioned in this trial as having had any connection to the alleged conspiracy. The hearsay testimony relating his statements was not even arguably admissible under the co-conspirator exception.*

The district court's instruction to the jurors advising them that they could use these statements only if the declarant was a member of the conspiracy does not cure the error in admitting this testimony. The above-cited cases and numerous others (e.g., United States v. Nixon, 418 U.S. 683, 701 n.14 (1974); United States v. Cohen, 489 F.2d 945, 950 (2d Cir.

*A fortiori, the statements made by Diamond could not have been made in the course of and in furtherance of the conspiracy (F.R.Ev. 801(d)(2)(E)[01]), there being no evidence adduced that Diamond was a member of this conspiracy.

1973); United States v. Puco, 476 F.2d 1099, on petition for rehearing, 476 F.2d 1106, 1107 (2d Cir.), cert. denied, 414 U.S. 844 (1973)) establish a district court's obligation to make a preliminary ruling on the declarant's membership in the conspiracy before admitting his statements against charged conspirators. The route followed by the district court below -- admission of the testimony in conjunction with a jury instruction that the declarant must be a member of the conspiracy -- is not the equivalent of a pre-admission ruling: the method elected below imposes a difficult and confusing burden on the jury and, by placing the evidence before the jurors before its admissibility is resolved, makes true exclusion of the evidence impossible. See I. J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE §104[05], at 104-44-104-45 (1976).^{*} Long before F.R.Ev. 104(a) and recognition of this requirement of a preliminary ruling by the district court, Judge Hand, in United States v. Dennis, 183 F.2d 201, 230-231 (2d Cir. 1950), affirmed, 341 U.S. 494 (1951), expressed the following opinion about a district court's reliance on the jury to determine whether the declarant was a member of the conspiracy, rather than the issuance of a preliminary ruling on the admissibility of the

^{*}Judge Weinstein's comments are applicable to the instructions given below: "[T]he court in Carbo v. United States [314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964)] illustrated the absurdity of such an instruction by pointing out that the judge would, in effect, be telling the jury not to consider the declarations unless they had already found the defendant guilty."

statement:

The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide, as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence, without instructing them to consider it as proof only after they too have decided a preliminary issue which alone makes it competent.

Id., 183 F.2d at 231.

The admission of the hearsay evidence in the case at bar resulted in severe prejudice to appellant DeLuca. By its nature, the testimony confirmed the Government's claim that there had been a conspiracy to possess stolen goods, which entailed the sale of these goods to a group of men described as Hassidic Jews. Nearly all the other evidence offered by the Government to prove the existence of this conspiracy -- the exceptions being Pollari's testimony that DeLuca assisted in the unloading of the Time DC truck and the evidence alleging that DeLuca rented a U-Haul truck that was subsequently used to transport the goods -- focused on the other defendants and excluded Savino (who was acquitted by directed verdict) and DeLuca. According to Pollari, only DeLuca was not a patron of Roberts' Lounge, the apparent operation center of this and other conspiracies, nor did DeLuca participate in the initial rental of vehicles to transport the stolen goods on March 12. It was the other defendants -- not DeLuca -- who delivered the goods

to the S & F warehouse and the CBS warehouse on March 12 and 13. DeLuca and Savino were the only defendants not present at the early morning meeting at the Blue Bay Diner on March 13. Unlike the other defendants, DeLuca was not shown to have received any money from this crime, and while he was present at DiCandia's house during one pay-off, he was seated in another room and was not shown to have conversed with the other defendants. Cogar, the second informant, had dealings with Gomez and Santa, and Agents Dowd and Pecoraro made observations of Patrick and James DeFilippo and Gomez; again, DeLuca was not featured in this evidence. And DeLuca alone presented an alibi.

The evidence of Diamond's statements bears the distinction of pulling DeLuca into the conspiracy because, as the district court advised the jurors, a co-conspirator's statement may be considered as evidence against all the conspirators. Though there might be some confusion in the court's instruction as to how precisely this co-conspirator rule was to be applied,* its likely impact on the jury is evident: this was incriminating proof of the conspiracy and, moreover, of each defendant's participation. It should be recalled that the conversation between Diamond and Santa was among the first and only items the jury requested during deliberations and which was re-read by the court. As to the other defendants, against whom there were

*See fn., supra, at 27.

considerable allegations of participation in the conspiracy, the admission of this proof may not have been unduly significant; but as to DeLuca, against whom there was so little evidence of participation, Diamond's statements confirming the existence of the conspiracy may well have been the proof upon which the jury relied. Because of this substantial potential for prejudice, the improper admission of Diamond's statements against DeLuca constitutes reversible error.

Point III

PURSUANT TO F.R.APP.PROC. 28(i), APPELLANT DE LUCA ADOPTS POINTS I AND II OF CO-APPELLANT VINCENT JAMES SANTA, AS WELL AS ALL OTHER RELEVANT AND CONSISTENT POINTS OF ALL CO-APPELLANTS.

Appellant DeLuca hereby adopts co-appellant Vincent James Santa's arguments pertaining to the double jeopardy bar to the instant prosecution on the conspiracy count (Points I and II of co-appellant's brief, arguing double jeopardy and plain error). See United States v. Malacelli, 503 F.2d 971, 981, 982-987 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975). Additionally, appellant DeLuca adopts all other relevant and consistent points of his co-appellants.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 3, 1978

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Samuel B. Bannister

